Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of)
)
2006 Quadrennial Regulatory Review - Review) MB Docket No. 06-121
of the Commission's Broadcast Ownership Rules)
and Other Rules Adopted Pursuant to Section 202)
of the Telecommunications Act of 1996)
)
2002 Biennial Regulatory Review – Review of) MB Docket No. 02-227
the Commission's Broadcast Ownership Rules)
and Other Rules Adopted Pursuant to Section)
202 of the Telecommunications Act of 1996)
)
Cross-Ownership of Broadcast Channels and) MB Docket No. 01-235
Newspapers)
)
Rules and Policies Concerning Multiple) MB Docket No. 01-317
Ownership of Radio Broadcast Channels in)
Local Markets)
)
Definition of Radio Markets) MB Docket No. 00-244

COMMENTS OF
SCREEN ACTORS GUILD, THE DIRECTORS GUILD OF AMERICA, THE PRODUCERS GUILD OF AMERICA, AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, THE CAUCUS FOR TELEVISION PRODUCERS, WRITERS & DIRECTORS, THE WRITERS GUILD OF AMERICA, WEST, AND THE WRITERS GUILD OF AMERICA, EAST

Screen Actors Guild (SAG), the Directors Guild of America (DGA), the Producers Guild of America (PGA), American Federation of Television and

Radio Artists (“AFTRA”), the Caucus for Television Producers, Writers & Directors ("Caucus"), the Writers Guild of America, West (WGAW) and the Writers Guild of America, East (WGAE) (hereinafter “Joint Commenters”) respectfully submit these comments in the above-captioned proceedings.

I. BACKGROUND

Screen Actors Guild is the nation’s premier labor union representing actors. With twenty branches nationwide, SAG represents over 120,000 actors in motion pictures, television, commercials, and new media formats, working under SAG contracts throughout the world. The Guild exists to enhance actors’ working conditions, compensation, and benefits and to be a powerful, unified voice on behalf of artists’ rights.

The Directors Guild of America represents close to 13,500 directors and members of the directorial team working in U.S. cities and abroad. Their creative work is represented in feature films, television, commercials, documentaries, and news. The DGA’s mission is to protect the economic and creative rights of directors and the directorial team.

The Producers Guild of America represents the entire producing team in motion pictures, television and new media, comprising the entertainment industry's most distinguished collection of both above- and below-the-line producing talent. The PGA is charged with promoting the profession of producing and the spirit of entrepreneurship in entertainment, providing educational and employment opportunities for its members, and protecting the integrity of the producing credit.

American Federation of Television and Radio Artists is a national labor organization with a membership of over 80,000 professional employees working in the news and broadcast, entertainment, advertising and sound recordings industries. AFTRA's membership includes news reporters, anchors, sportscasters, talk show hosts, announcers, disc jockeys, producers, writers and other on-air and off-air broadcast employees as well as actors, singers and other performers on dramatic programs, game shows, talk and variety shows, and other entertainment television programming. AFTRA members work at networks and in stations in markets of varying size throughout the United States.

The Caucus for Television Producers, Writers & Directors is an invitation-only, volunteer organization whose members include some of the nation's most successful and respected television producers, writers and directors.

The Writers Guild of America, West is a labor union that represents nearly 12,000 writers in the motion picture, broadcast, cable, and new media industries in entertainment and news. The WGA represents, protects, and advocates for the creative and economic rights, benefits, and working conditions of writers. The WGAW conducts numerous programs, seminars, and events throughout the world on issues of interest to and on behalf of writers and is active in public policy and legislative matters on the local, national, and international levels.

The Writers Guild of America, East is a labor union representing writers in motion pictures, broadcast, cable, new and news media. The WGAE is active in legislative activities on the state, federal and international levels with a special focus on globalization, labor, communications and copyrights. It also conducts a number of programs, seminars and events on issues of interest to, and on behalf of writers.

Joint Commenters represent substantial numbers of individuals who are deeply involved in the creation of programming utilizing our public airwaves, and thereby have standing to submit comments it this proceeding. In addition, several of the Joint Commenters presented testimony before the Commission during the October 3, 2006 public hearing on media ownership[1]

[1] Testimony of SAG President Alan Rosenberg and SAG National First Vice President Anne-Marie Johnson; PGA President Marshall Herskovitz; DGA Third Vice President Taylor Hackford; AFTRA National President John Connolly, Caucus of Television Producers, Writers & Directors Member Stephen Cannell; WGAW President Patric Verrone, WGAE President Mona Mangan, before the Federal Communications Commission, Public Hearing on Media Ownership, Los Angeles, California, October 3, 2006.

as well as before the Commission at its four subsequent media ownership hearings.

II. INTRODUCTION

In comments filed in the Federal Communications Commission's 2006 Quadrennial Regulatory Review of the Commission's Broadcast Ownership Rules,[2] (hereinafter referred to as "Joint Commenters Filing"), several of the Joint Commenters argued that the level of market domination exerted by the broadcast networks has resulted in a dramatic decline in independently produced primetime programming, drastically limiting the diversity of viewpoints on the American broadcast airwaves and compelling corrective regulatory action by the Commission.

In particular, the Joint Commenters argued that the unparalleled vertical consolidation between broadcast networks and movie studios has given the broadcaster/studio conglomerates unfettered control over the primetime airwaves, which they utilize to exploit their market power by either excluding rival programming or by forcing independent producers to forego syndication revenues in exchange for carriage. This vertically integrated dominance over both content and distribution has resulted in a disturbing contraction in the

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[2] Comments of Screen Actors Guild, the Directors Guild of America, the Producers Guild of America, and American Federation of Television and Radio Artists, October 23, 2006, to the Federal Communications Commission's Further Notice of Proposed Rulemaking, 21 FCC Rcd. 8834, hereinafter, "previous Joint Commenters" filing).

diversity of viewpoints to which the public is exposed via primetime broadcast television programming.

On July 31, 2007, the Commission announced the release of, and sought comment on, ten FCC-Commissioned research studies on media ownership which were "intended to inform the Commission's comprehensive review of its broadcast ownership policies."[3] These studies included a study by professor Austan Goolsbee entitled "*Vertical Integration and the Market for Broadcast and Cable Television Programming*" (hereinafter referred to as the "Goolsbee Study"), which deals primarily with the impact of vertical media and entertainment integration on the availability of diverse television programming options.[4] In this study, which focuses on both primetime broadcast programming and cable network carriage, professor Goolsbee examines whether, and the degree to which, vertically consolidated producers "systematically discriminate against independent content in favor of their own content."[5]

It is noteworthy that Goolsbee chose network primetime broadcast programming as the relevant segment to measure potential content

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[3] See generally, FCC Public Notice DA 07-3470, released on July 31, 2007, "*FCC Seeks Comment On Research Studies On Media Ownership*," MB Docket No. 06-121 (MB Docket No. 02-277, MM Docket Nos. 01-235, 01-317, 00-244).

[4] "*Vertical Integration and the Market for Broadcast and Cable Television Programming*," Austan Goolsbee, Robert P. Gwinn Professor of Economics, University of Chicago, Graduate School of Business, American Bar Foundation and National Bureau of Economic Research, April 2007.

[5] Goolsbee at 2.

discrimination. Broadcast network primetime is a unique segment of the television marketplace that attracts the largest amount of viewers (and advertisers). For the 2005-2006 broadcast season, the average nightly primetime viewership was over 30 million households; compared with just over 20 million viewers for the top *twenty* cable networks combined. Goolsbee recognizes the unique characteristics of the network primetime segment when he notes that there is "a considerable interest in the operation of the primetime programming choices of the major broadcast networks," and, despite a decline in primetime viewing, the networks "remain extremely powerful television entities with the biggest potential markets."[6]

As Joint Commenters pointed out in their previous filing, each of the network's primetime lineups have triple or quadruple the primetime viewership of the largest cable channel. For instance, during the 2005-2006 season, primetime programs on CBS (the highest ranked network) averaged 12.6 million viewers, and NBC (the fourth–ranked network) averaged 9.7 million viewers. During a comparable time period, primetime viewing on USA (the highest ranked cable channel) averaged only 2.6 million viewers.[7] In their previous filing, the Joint Commenters pointed out that the average number of primetime viewers on any of the four major broadcast networks

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[6] Goolsbee at 6 and 7.
[7] These statistics represent the average number of viewers watching a particular channel during any single minute increment of primetime programming.

during primetime is over *eleven* times greater (10,767,500) than the average number of viewers on one of the top twenty cable channels (957,650).[8]

a. Network Discrimination Against Non-vertically Integrated Content Threatens Viewpoint Diversity.

The evidence presented in the primetime broadcast portion of this study provides considerable credence to the arguments set forth in the original filing by the Joint Commenters. Specifically, the Goolsbee study found—as Joint Commenters had argued—that (1) the level of independently produced content on network primetime is a meager 18% and falling, and (2) networks discriminate against programming not produced in-house by applying a lower standard for carrying their own shows than for carrying independent programming.

Consequently, Goolsbee finds that "the output from in-house television production is overwhelmingly more likely to show up on its own network than the independents' is."[9] His statistical analysis of the current broadcast landscape leads to his conclusion that "primetime broadcast television is a heavily vertically integrated endeavor" in which "the life of an independent

[8] These averages are calculated by adding the total number of viewers across both the four broadcast networks and the top twenty cable channels, and dividing by the number of channels.
[9] Goolsbee at 11.

producer of programming is likely to be rather difficult."[10] A simple analysis of the declining number of independent producers since the repeal of the Commission's Fin-Syn rules[11] (from twenty-three in 1993 to two today),[12] demonstrates that the viability of independent producers in today's vertically integrated broadcast/production environment is not just difficult; it is virtually impossible.

The discriminatory practices of dominant broadcast networks have acted as an anticompetitive barrier to entry: the dominant networks constructed a Hobson's Choice for any would-be independent producer whereby the networks take ownership or don't take at all. The resulting contraction in the number of content providers, and consolidation of even more power in the hands of the already dominant broadcast networks, constitutes an evisceration of the Commission's goal of viewpoint diversity and cannot be remedied absent regulatory intervention.

b. The Commission Should Remedy This Market Condition by Establishing a Primetime Independent Production Requirement.

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[10] Id.

[11] See generally, *Evaluation of the Syndication and Financial Interest Rules, Second Report and Order*, 08 FCC Rcd. 3282 (1993).

[12] As Joint Commenters pointed out in their original filing, in 1992 the following independent producers were supplying the major networks with primetime programming: Aaron Spelling Productions, Carsey-Werner, Castle Rock, Columbia Pictures TV, Cosgrove-Murer, HBO Independent, Hearst, Lorimar Television, Lucasfilm, MGM/UA, Mozark Productions, New World (Four Star Holdings), Paramount TV, Reeves Entertainment, Shukovsky/ English, Stephen J. Cannell Productions, Steven Bochco Productions, Touchstone Television, TriStar TV, Universal, Viacom Productions, Warner Bros.

Accordingly, Joint Commenters respectfully submit that the Commission should exercise its authority under Section 202(h) of the Telecom Act of 1996[13] to effectively address this market condition—while supporting its overarching goal of broadcast diversity—by instituting a narrowly tailored, content-neutral independent producer requirement. This rule would require that 25% of network primetime broadcast programming must be supplied by a truly independent source. As Joint Commenters pointed out in their previous filing, a source would be considered an "independent source" if is not directly or indirectly owned or controlled by or affiliated with ABC, CBS, FOX, or NBC, or their subsidiaries or sister companies. If one of these companies owns or controls more than a 33.33% financial interest in, is the distributor of, or owns the copyright in a program, then it is considered produced by the network and not by an "independent source." A program cross-licensed by one network to another is not considered a program produced by an "independent source." Moreover, the term or license period for the networks' licensing of independent programming could not exceed six full seasons.

[13] As the Court in *Prometheus Radio Project* noted, "the Commission's authority under 202(h) was not a one-way ratchet. What if the Commission reasonably determines that the public interest calls for more stringent regulation? Did Congress strip it of the power to implement that determination? The obvious answer is no, and it will continue to be so, absent clear congressional direction to the contrary." *Prometheus Radio Project, et. al. v. FCC*, 373 F.3d 372, 382 (3d. Cir. 2004).

Lastly, this requirement would apply only to an over-the-air network with 95% or more NTI[14] and with greater than a 4.0 Household Rating.[15] Currently only ABC, CBS, Fox, and NBC meet this definition of a gatekeeper. However, should another network attain this level of broadcast market share, it would likewise become subject to the rule. In this regard, Joint Commenters' scope differs from that of Goolsbee, who examined the top six broadcast networks (ABC, CBS, Fox, and NBC, as well as the now-defunct UPN and WB) in his research. Joint commenters maintain that the four networks that reach this higher level of viewership have dramatically elevated market power and incentive to discriminate against independently produced content.

Thus, under this approach, the networks would be free to own and produce the remaining 75% of their primetime lineups, and they could hold up to a 1/3 ownership stake in any independently produced show. As Joint Commenters pointed out in their original filing, such an independent production requirement will ensure the existence of currently nonexistent financial incentives for creating innovative programming outside the network structure. Therefore, the 25% content-neutral independent producer

[14] Nielsen Media Research measurement of TV households (NTI).
[15] Neilsen Media Research assigns a "point" to every one percent of current television-owning households in the United States. As Attachment G of the Joint Commenters' previous filming demonstrated,, for 2006-2007 there are over 111,400,000 TV households (98.2% of all households), thus 1 Household rating point is equal to 1,114,000 viewers. Currently, only the four broadcast networks have above a 4.0 Nielsen rating.

requirement is critical to the preservation of a viable independent producer marketplace that will deliver a variety of viewpoints beyond those of the four major broadcast networks.

III. THE GOOLSBEE STUDY PROVES THAT THE LEVEL OF INDEPENDENTLY PRODUCED CONTENT IN NETWORK PRIMETIME IS MEAGER

The Goolsbee study notes that after the financial interest and syndication ("Fin-Syn") rules were entirely abandoned in 1995, the broadcast networks immediately began to vertically integrate by merging with television and movie production studios.[16] This dramatic expansion in the vertical ownership of broadcast programming led to an attendant "immediate increase…in the concern over what such integration implies for the ability of independent programming to get on the air."[17]

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[16] Since the repeal of the Fin-Syn rules, the networks' programming holdings have grown to include the following:
ABC: Disney Channel, Toon Disney, ABC Family, SOAPNet, ESPN Networks, A & E, Biography, History Channel, Military History Channel. ABC owns 40% (Comcast owns the other 60%) of E! and Style Network. These channels are in addition to the studio holdings of ABC's parent company Disney: Walt Disney Pictures, Walt Disney Feature Animation, DisneyToon Studios, Buena Vista Pictures, Touchstone Pictures, Miramax, and Hollywood Pictures.
CBS: Showtime, FLIX, The Movie Channel, Sundance Channel, College Sports TV, the CW (50% with Warner Bros.) The majority of shows on CBS' 2006-2007 primetime lineup are produced by CBS Productions, CBS Paramount.
NBC: Telemundo, CNBC, Bravo, USA, Sleuth, Sci-Fi, MSNBC. These channels are in addition to the studio holdings of NBC's parent company: Universal and Focus Features.
Fox/News Corp: FX, National Geographic, Fox News, Fox Sports, Fox Movie Channel, Fuel TV, Speed Channel. Fox's parent company, News Corporation, also owns the motion picture studios 20th Century Fox Pictures, Fox Searchlight Pictures and Blue Sky Studios.

[17] Goolsbee at 3.

This integration was not limited solely to broadcast television; it permeated the cable and direct satellite broadcast markets, as well. While non-broadcast programming is beyond the purview of the FCC, it is worth noting that claims that alternative outlets are available for independent programmers are largely illusory.[18] In her examination of vertical integration of broadcast and cable markets, Cynthia Chris writes "[c]able's relatively abundant channel capacity once seemed a virtual guarantor of competition among a large array of owners. Instead cable has become a media arena in which, despite burgeoning product differentiation, patterns of ownership look more and more like oligopolistic broadcasting with every new deal."

Indeed, an analysis of the top fifteen ad-supported cable channels in terms of viewership demonstrates that each of these channels is owned by one of the four broadcast networks[19] or either Time Warner or Viacom.[20] A review of the six highest-rated primetime broadcasting channels and the twenty highest-rated primetime cable channels (which cover more than 68 million viewers on any given night) shows that ABC, CBS, Fox and NBC own 75.92% of the channels. ABC, CBS, FOX, NBC, Viacom and Time Warner own 94.17% of the channels. NBC's recent $925 million acquisition of Oxygen Media, the

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[18] See, for example, Cynthia Chris, "*Can You Repeat That? Patterns of Media Ownership and the 'Repurposing' Trend,*" The Communication Review, Vol. 9, pp 63-84, 2006.
[19] See Attachment A and D.
[20] *Id.*

independent cable television channel for women, underscores this point. As the Los Angeles Times reported on the day of the sale, "NBC's cluster of cable channels -- USA Network, financial news channel CNBC, Sci-Fi, Bravo and MSNBC -- contributes 50% of the company's profit. 'Cable is the real driver of this company," NBC Universal Chief Executive Jeff Zucker said.'"[21]

This pattern of vertical media consolidation is also evident on the Internet. The third most visited website in the U.S. is Newscorp's MySpace.com, the most-visited news site is CNN, and the most-visited sports news site is CBS.[22] NBC's acquisition of Oxygen augments its $600 million purchase of the women-oriented website iVillage in 2006.[23] To be clear, Joint Commenters are not making an argument for FCC oversight over non-broadcast programming or Internet content. Rather, this information underscores the extent of the vertical integration of content in the modern media landscape, and the resulting need for the Commission to ensure the viability of independent voices on the public's primary source for news and entertainment: broadcast television.

[21] Meg James, "*NBC Adds a Gal Pal to its TV Holdings*," Los Angeles Times, October 10, 2007.
[22] Alexa Web Search: Top 500 United States Web Sites. http://www.alexa.com/site/ds/top_sites?cc=US&ts_mode=country&lang=none.
[23] Alex Viega, "*NBC's Oxygen Purchase Aimed at Attracting Women Viewers*," L.A. Daily News, October 9, 2007.

In the wake of this unprecedented consolidation, "the networks' full or partial ownership stakes in the shows they broadcast rose by two thirds from 1995 to 1998—from 28% to 46%."[24] Goolsbee notes that CBS was the most vertically integrated broadcast network over the timeframe studied (the 2000-2001 through 2004-2005 seasons), producing between 60-85% of the content it airs. Overall, the portion of vertically integrated shows on the six largest networks[25] generally ranges between 54.4 and 59.4% for the period examined.[26] Examined from another angle—how much of the content a network's studio affiliates produce actually ends up on that network's primetime broadcast schedule—Goolsbee's figures are equally striking: 86.2% of primetime programming produced by Disney/ABC was broadcast on its own network; 58.7% by Newscorp/Fox (77.0% when UPN is included); and 96.8% by GE/NBC.[27]

As Goolsbee notes, "[h]owever one chooses to measure vertical integration…typically the majority of what is on any broadcast network during primetime, was made 'in house.'"[28]

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[24] Goolsbee at 6, citing Richard E. Caves' book "*Switching Channels: Organization and Change in TV Broadcasting*."
[25] As noted *supra*, Goolsbee examines the top six broadcast networks for that timeframe—ABC, CBS, Fox, NBC, WB and UPN, rather than the top four.
[26] Goolsbee at 8, 9, and 32.
[27] Goolsbee at 34.
[28] Goolsbee at 10.

As the Joint Commenters pointed out in their original filing, approximately 67% of content on primetime broadcast TV was independently produced during the 1992-1993 season, prior to the reversal of the Fin-Syn regime. This compares with less than 25% of the 2006-2007 broadcast network primetime lineup that is independent.[29] Goolsbee's analysis paints an even more dire picture for independent production and diversity of voices on network primetime television. He notes that, when network-owned programming is combined with programming produced by the other broadcast networks, "the share of truly independent programming—programming that is not owned by any company that also owns a broadcast network—is fairly constant across the networks at around 18%"[30] (emphasis added).

In other words, the portion of primetime network programming supplied by sources other than the broadcast networks themselves has withered *from two-thirds of the lineup in 1993 to less than one-fifth currently*. This disturbing trend toward homogeneity of viewpoints on broadcast television has become even more exacerbated over time—Goolsbee notes that the share of primetime shows on the February/March 2007 primetime schedule produced by truly independent sources has continued to decline precipitously

[29] Joint Commenters filing at 6.
[30] Goolsbee at 9.

since the end of the 2004-2005 season to <u>a mere 12.8%</u> for the top six networks (11.1% for ABC, 10.5% for CBS, 11.1% for NBC, and 25.0% for Fox).

Goolsbee's study does not, however, account for variances in the types of independently produced programming being granted access to the public's airwaves by the broadcasters. A closer categorical look at the networks' independent offerings demonstrates that, of those shows that are still independently produced in the 2006-2007 season, a significant portion of them (as high as 42% on ABC) were reality shows.[31] Thus, for scripted programming, network control of the primetime programming lineup is even more dominant.

As discussed *supra*, and in greater detail *infra*, the networks have, in part, been able to establish their market dominance in the primetime broadcast arena by denying independent producers syndication revenues. This trend is exacerbated by the relegation of independent producers to reality programming, due to the fact that reality programming is not conducive to repeat broadcasts or syndication. Even for reality programming, the networks are beginning to insist on an ownership stake, as evidenced by the recently announced deal by CBS Paramount Network Television to bring Jay

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[31] On ABC's 2006-2007 primetime lineup, 42% of independent productions were reality shows; 33% on NBC; 20% on CBS; and 16% on Fox.

Bienstock, the producer who oversaw multiple seasons of *Survivor* and *The Apprentice,* into CBS's official corporate structure to create new reality programming which will be owned by the network.[32]

In Reply Comments filed in this docket, the four major broadcast networks (ABC, CBS, Fox, and NBC) claim that cross-over programs provided by studios affiliated with another network should not be excluded from the category of "independent producer."[33] Contrary to the broadcasters' contention, Goolsbee does not include content produced by other broadcast networks in his definition of "truly independent programming," which he defines as "programming that is not owned by any company that also owns a broadcast network."[34] He analyzes "truly independent" programming as a discrete, free-standing category with its own characteristics, separate from vertically integrated content or that produced by the other networks.

Network-produced programming (whether internally produced by the network that airs it, or produced by another network), differs substantially from programming produced by an independent producer. As Goolsbee points out, "rival networks have more bargaining power over syndication revenue

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[32] Josef Adalian, "*Bienstock signs deal with CBS: Producer pacts to create new unscripted projects*," Daily Variety, April 1, 2007.
[33] Reply Comments of CBS Corporation, Fox Entertainment Group, Inc. and Fox Television Stations, Inc., NBC Universal, Inc. and NBC Telemundo License Co., and the Walt Disney Company (hereinafter the "Broadcast Networks") at 9.
[34] Goolsbee at 9.

than the fully independent producers do."[35] Whereas an independent producer often has only a single television production to market to a network, a rival network may have several properties across a range of platforms (TV, movies, music, Internet) with which to bargain. Moreover, unlike independent producers, rival networks can certainly always opt to air their productions on their own broadcast network.

While Goolsbee analyzes programming created by one broadcast network and shown on another as its own category with distinct characteristics, his research nonetheless dramatically exposes the stark fact that in February/March of 2007, <u>all but a paltry 12.8% of the shows</u> on America's primetime broadcast lineup <u>were produced by only five companies</u>. This homogeneity of entertainment sources—which stems directly from broadcasters' unprecedented vertically integrated market power—hardly constitutes a diversity of viewpoints on the nation's broadcast television airwaves. In accordance with its long-standing goals of promoting competition, diversity, and localism through its media ownership rules,[36] the Commission must take corrective action to rectify this market condition.

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[35] Goolsbee at 16.
[36] Further Notice of Proposed Rulemaking, 21 FCC Rcd. 8834, ¶ 4.

IV. THE GOOLSBEE STUDY DEMONSTRATES THAT NETWORKS DISCRIMINATE AGAINST PROGRAMMING NOT PRODUCED IN-HOUSE

In determining whether the broadcast networks discriminate against shows in which they have no ownership stake, Professor Goolsbee examined advertising revenue received for a wide variety of programming. His data leads to the inescapable conclusion that the prevalence of vertically integrated programming on primetime broadcast network television is driven not by efficiency, but by discrimination.

As Goolsbee notes, "[t]he network trying to maximize its direct profit should, on the margin, choose between their own shows and the shows of others such that the impact on profit is the same."[37] To the contrary, the evidence presented by Goolsbee demonstrates that vertically integrated shows perform worse (in terms of ad revenue) across a range of demographic variables than non-integrated shows. The non-vertically integrated programming in the same time slot and the same season must generate 16% greater ad revenue to stay on the air.

In order to gain more granularity, Goolsbee examined the ad revenue rates of both non-vertical shows owned by other networks and independently produced programming. He found that vertically integrated shows generate

[37] Goolsbee at 13.

25% less ad revenue than programs made by production companies controlled by competing networks. Thus, the networks appear to apply a higher advertising standard to these shows. Interestingly, truly independent programming does not appear to have such an ad revenue differential. But Goolsbee is quick to point out that:

> This is not to say that the picture is rosy for the true independents, by any means. There is no information in these data about syndication profits from shows and the differential coefficients of the fully independent producers relative to the rival networks may simply reflect that the rival networks have more bargaining power over syndication revenue that the fully independent producers do. In other words, if a broadcaster can't get part of the syndication profits from the show's producer, they may require that show to generate higher advertising revenue to put it on the air.[38]

Goolsbee's supposition is borne out by the experience of independent producers, many of whom have experienced ultimatums from the networks that are very similar to Goolsbee's paraphrased statement "give us an ownership stake or we will not pick up this show."[39]

Professor Richard E. Caves, in his book *Switching Channels: Organization and Change in TV Broadcasting*, describes a range of scenarios whereby networks "holdup" independent producers for ownership or syndication rights. In one instance, "one independent producer reported a network

[38] Goolsbee at 16.
[39] Goolsbee at 12.

willing to finance the producer's gap between production costs and the network's license fee in exchange for 30 to 40 percent of future syndication revenues."[40] As a 1996 Broadcast & Cable article noted, "each of the Big Three have cut deals on selected new shows that could result in a major syndication windfall down the road if the series is a hit."[41] Caves also describes other examples where networks use their disproportionate bargaining power to exact ownership stakes. In one, ABC in 1999 auctioned a favored Wednesday 9:30 slot to three competing program suppliers in exchange for an ownership stake; in another, ABC cancelled "the incumbent *The Norm Show* in favor of *Oh Grow Up*, for which Greenblatt-Janollari Productions… granted a 10 percent equity share to ABC."[42]

As Goolsbee demonstrates, there is a revenue premium for shows not produced in-house.

In the case of programming produced by rival networks, this revenue premium manifests itself as an advertising revenue premium (which Goolsbee shows is approximately 25%). In other words, these shows must bring in ad revenues that are 25% higher than those of a vertically-produced show in order for a network to continue carriage. In the case of truly

[40] Caves, Richard E., *Switching Channels: Organization and Change in TV Broadcasting,* Harvard University Press, 2005, p. 197-198.
[41] Cynthia Littleton, *"Broadcast Networks Face Fin-Syn Trade-off,"* B&C, June 3, 1996, pp. 35-36.
[42] Caves at 199.

independent programming, this revenue premium is in the form of increased revenues through syndication rights. Thus, broadcast networks do not require an ad-related premium from independent producers because instead they can (and historically have, as evidenced by the evisceration of the independent production ranks) exact a syndication or ownership based premium in exchange for carriage.

Accordingly, non-vertically integrated programming becomes more appealing to broadcast networks than programming produced in-house only when these revenue premiums become greater than the inherent cost savings to the network of producing programming in-house (with its attendant shifting of money from one corporate subsidiary's pocket to another). In other words, if forced to choose between a vertically integrated show and one that is independently produced, broadcast networks will choose to continue to air the vertically integrated show, even when objective measures demonstrate that it is performing worse than the independent show.

As the Washington Post recently reported, NBC chose to cancel the independently produced show *Studio 60 on the Sunset Strip* instead of a similarly-themed vertically integrated show *30 Rock*, despite the better ratings of the former. The *Post* sarcastically noted that "*30 Rock* is averaging 2.7 percent of the country's audience of 18-to-49-year-olds. *Studio 60* is averaging only 3.6 percent of the audience in that age bracket. Hmmmmm. *30 Rock*'s overall audience, season-to-date, is a solid 5.8 million viewers.... *Studio 60's* season-to-date audience is just 8.5 million..."[43]

In a perfectly functioning competitive market, with no oligopsonistic market players who act as a barrier to carriage, networks would maximize their profits by choosing to carry those shows that bring in the maximum revenue. Since Professor Goolsbee's data confirms that vertically integrated programming brings in decreased revenues as compared to programming from other sources, broadcasters are making programming choices to the detriment of their own revenue generation. Thus, because vertically integrated programming brings in less revenue than other programming, yet remains on the air despite this earnings deficiency, the market for such programming is not behaving in the manner that a healthy and competitive market ordinarily would.

Because of their market dominance, broadcast networks do not have to behave in the economically rational, revenue-maximizing basis that they would in a competitive market. Hence, lower revenue-generating shows stay on the air to the detriment of producers, advertisers, and (not

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[43] Lisa de Moraes, "*C'mon, Gina, Find a Way to Turn That Frown Upside Down*!," The Washington Post, Thursday, April 5, 2007, C07.

insubstantially) the American viewing public—in other words, to the detriment of everyone except the networks themselves. However, it is not the responsibility of the Federal Communications Commission to protect the profit margins of network broadcasters.

To the contrary, it is the responsibility of the Commission—through its media ownership policies—to protect the public interest by promoting competition, diversity, and localism over the nation's broadcast airwaves. As Ted Turner, who was able to create CNN and help re-invent the television industry and improve both the quantity and quality of news programming available to viewers, put it, "When I was in the media business, especially after the federal government changed the rules to favor large companies, I tried to sweep the board…Yet I felt then, as I do now, that the government was not doing its job. The role of government ought to be like the role of a referee in boxing, keeping the big guys from killing the little guys."[44] Because the market for primetime broadcast network programming is not behaving competitively, the Commission's policies must seek to remedy this market malfunction by focusing on its cause—the unchecked market dominance of the four major broadcast networks stemming from their unprecedented vertical integration. The least restrictive means (as opposed to, say,

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[44] Ted Turner, "*My Beef With Big Media: How government protects big business - and shuts out upstarts like me*", Federal Communications Law Journal, March 2005, pp 223. Originally published in The Washington Monthly, July/August 2004.

divestiture) to reconcile this market aberration is for the Commission to institute a content-neutral independent production requirement, as described above.

VII. CONCLUSION

The evidence presented in Professor Austan Goolsbee's FCC-Commissioned study entitled "*Vertical Integration and the Market for Broadcast and Cable Television Programming*" supports Joint Commenters' argument that (1) the level of independently produced content on network primetime is meager, and (2) the broadcast networks discriminate against programming not produced in-house. These abuses of the broadcast networks' market power result in a lack of viewpoint diversity that can only be remedied by corrective action by the Commission. Accordingly, for the reasons set forth above, the Joint Commenters urge the Commission to enact a narrowly tailored, content-neutral 25% independent producer requirement for network primetime television programming.

Respectfully submitted,

Erik V. Huey
VENABLE LLP
575 7th St. NW
Washington, DC 20004
(202) 344-4000
Counsel for Screen Actors Guild, the Directors Guild of America, the Producers Guild of America, American Federation of Television and Radio Artists, the Caucus for Television Producers, Writers & Directors, Writers Guild of America, West, and Writers Guild of America, East

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